

discussions with the Bureau's staff on the procedures to be followed in implementing the Agreement. On February 14, 1994, counsel for KMMX filed a letter<sup>13/</sup> with the Commission's Acting Secretary describing these discussions, attaching a copy of the Agreement and requesting that the KMMX and KIOL STA's be extended in order to permit those stations to continue to operate with their STA facilities while the Bureau reviewed and acted on the proposals contained in the Agreement. Ex. L. The Chief of the Audio Services Division responded to the request for extension in a letter dated February 23, 1994 (Ex. C) in which he extended the STA's for 180 days, stating:

We will treat your requests as petitions for partial reconsideration of the December 1 letter with respect to the automatic termination of the STAs. We believe that the additional time will enable us to review the agreement and proposed solution, and thus potentially facilitate resolution of the LaMesa spacing concerns with expenditure of a minimum of resources on the part of the both the stations and the Commission. (emphasis added)

The Bureau subsequently extended the KMMX and KIOL STA's through September 6, 1996, while the Commission and the parties completed the steps to resolve the conflicts set forth in their Agreement. See Ex. D. A petition for rulemaking necessary to complete the Agreement was filed on April 14, 1994, but final action was not taken on it by the Commission until 18 months later. HDO, ¶4; Report and Order, 10 FCC Rcd 11018 (MMB 1995). Thereafter, an application to implement the changes authorized in the rulemaking was filed on October 15, 1995, and granted on March 6, 1996. Ex. D. KMMX ceased broadcasting on Channel 284C1 on June 28, 1996, two months after release of the HDO in

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<sup>13/</sup> The letter, Exhibit L hereto, is dated February 11, 1994, but was filed on February 14, 1994.

this case. The Bureau's extension of the KMMX STA in February of 1994 resulted in KLZK remaining silent for an additional 27 months.<sup>14/</sup>

Thus, from July 1, 1990, until June 28, 1996, there was only one period of time when Southwestern could have operated KLZK on any channel without violating the Commission's technical rules. That period extended from July 1, 1990 to April 28, 1992, when the KKYN upgrade application was granted. However, there is nothing in the record to indicate that Southwestern was ever aware of that opportunity. The Commission knew KLZK was silent throughout the period, but did not order Southwestern to resume operations until it sent a letter requesting information on December 2, 1992, some seven months after the period had expired. Ex. I. Meanwhile, Southwestern was attempting to resolve the KMMX STA problem, which it perceived to be the most significant impediment to returning KLZK to the air, and the Bureau acknowledged the validity of Southwestern's perception. Ex. G. In any event, the HDO did not allege that Southwestern should have resumed broadcasting during this limited period of time. Thus the licensee did not have the notice required by 47 U.S.C. § 309(e) that its application could be denied for failure to broadcast for that discrete period of time. See A.C. Elliot, Jr., 36 RR2d 1521, 1527-28 (Rev. Bd. 1976).

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<sup>14/</sup> The finding in ¶12 of the S.D. that Southwestern's acquiescence in the steps which lead to the solution of the KMMX STA/KLZK conflict somehow demonstrates that it does not possess the capability or intent to return KLZK to the air is ludicrous. If affirmed, it would constitute the first case in Commission history where a licensee was penalized for taking actions requested and approved by the Commission. See Exs. D, G and J and Report and Order, 10 FCC Rcd. 11018 (MMB 1995).

Moreover, contrary to the conclusions in ¶¶ 16 and 17 of the S.D., there is no evidence that Southwestern "refused" to return KLZK to the air as a Class A station for six years. To the contrary, the record demonstrates that Southwestern was precluded from operating as a Class A station during almost all of the six years and there is no evidence to support a conclusion that it was aware it could operate for the limited period described above. Finally, the fact that KZLK was silent for that 22 month period does not provide a basis for concluding that Southwestern lacked the capability and intent to resume operations. See Video Marketing Network, supra, (renewal granted to station which was silent for more than four years without even notifying Commission, much less requesting authority to discontinue operations).

**C. Southwestern's Failure to File Applications for Facilities Mutually Exclusive with the KMMX STA Cannot Serve as a Basis for Denying the KZLK Renewal Application**

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In ¶ 17 of his S.D., the ALJ concludes that since the Commission had the power under 47 C.F.R. § 73.1635(b) to terminate the KMMX STA Southwestern should have requested Commission action rescinding it. This proposition is ludicrous on its face.

First, in all of the correspondence concerning the KMMX STA, the Bureau never even hinted that Southwestern should take such action. Moreover, the HDO does not include any mention that Southwestern's failure to make such a request provided a basis for designating its application for hearing. Finally, no rule, case or policy is cited for the proposition that applicants who fail to make such requests can be penalized for their omissions. Thus, it is obvious that Southwestern never had the notice required by due

process of law that it should have requested the Commission to terminate the KMMX STA. See cases cited supra in part A of this argument and A.C. Elliot, Jr., supra.

Second, as also discussed above, Commission policy strongly favors settlement of litigation, not its initiation. In fact, in this case, the Bureau repeatedly urged Southwestern, KMMX and KIOL to seek a private voluntary settlement of the conflict and Mr. Crane of Southwestern was actively involved in efforts to achieve such a settlement. See Exs. A, C, F, G, J, K and M.

Third, even after the Bureau itself ordered KMMX to cease broadcasting on the STA in December of 1993, it reversed its position less than two months later when evidence of a settlement was presented to it. Exs. A and C. Thus, it is clear that if Southwestern had requested termination of the KMMX STA the Bureau, as well as the licensees of KMMX and KIOL, would have opposed grant of the request, and an even lengthier litigation would have ensued.

Accordingly, the Commission is respectfully requested to reverse that part of the S.D. which concludes that Southwestern's failure to request termination of the KMMX STA supports denial of the KLZK renewal application.

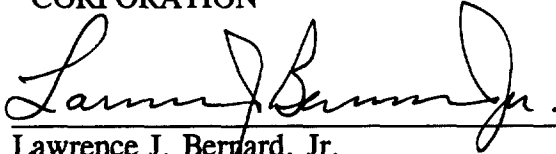
### **III. CONCLUSION**

For the reasons stated in part A of the foregoing argument, the Commission is respectfully requested to issue an interlocutory order directing the Mass Media Bureau to process the KZLK application filed May 8, 1996, and holding this proceeding in abeyance until the earlier of the date Southwestern reports that KZMK has resumed operations or February 9, 1997. Alternatively, for the reasons set forth in parts B and C of the foregoing

argument, Southwestern requests the Commission to reverse the S.D., grant the KZLK renewal application and order the Bureau to process the application for new KLZK facilities filed May 8, 1996.

Respectfully submitted,

SOUTHWESTERN BROADCASTING  
CORPORATION

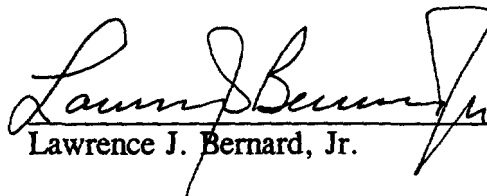
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were hand-delivered this 28th day of August, 1996 to:

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